Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates	WC Docket No. 06-90

BELLSOUTH'S OPPOSITION TO GEORGIA PUBLIC SERVICE COMMISSION'S PETITION FOR DECLARATORY RULING

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), opposes the Georgia Public Service Commission's ("GPSC's") Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates ("Petition"), filed April 18, 2006. The GPSC's Petition is fundamentally flawed, and the relief requested should be rejected in its entirety. The Commission should instead reaffirm that state commissions have no authority to implement section 271 and that, in any event, market forces, rather than regulatory agencies, should dictate the rates for de-listed network elements.

INTRODUCTION

This Commission has concluded that local market entrants ("competitive LECs" or "CLECs") are not "impaired" without unbundled access to some facilities, and thus CLECs can either deploy those facilities themselves or obtain them from third parties at market rates. In the teeth of that holding, the GPSC has decided that it, and not market forces, should dictate the rates at which high-capacity loops and transport and line sharing should be made available. The GPSC has done so by purporting to set rates under section 271 for facilities that this Commission

has determined should not be unbundled under section 251.[1] The GPSC, however, has no authority to set rates for purposes of section 271. Rather, as this Commission, multiple federal courts, and over two dozen state commissions have concluded, state commissions have no authority to implement section 271. Beyond that, the notion of establishing rates by regulatory fiat in this circumstance is directly contrary to this Commission's conclusion that, under section 271, "the market price should prevail" – "as opposed to a regulated rate."[2] In sum, the GPSC's pre-emptive price regulation has no place under section 271 and cannot be corrected by a thinly veiled request for forgiveness rather than by obtaining the necessary – and nonexistent – authority at the outset. This is particularly true for line sharing, which is not even a section 271 checklist element.

Moreover, the GPSC's effort to have the Commission effectively endorse its actions, after-the-fact, disregards any limitations that section 271 might place *on this Commission's authority* to consider the propriety of BellSouth's charges for the network facilities at issue. First, the Commission's jurisdiction to review BOCs' prices for section 271 checklist elements de-listed under section 251 should be confined to two situations: (1) consideration of the BOCs' long-distance entry application; or (2) post-entry, adjudication of compliance complaints brought to enforce section 271 – neither of which is presented here. Second, the Commission's only inquiry with respect to rates for section 271 checklist items is whether such rates are "just and reasonable" under sections 201 and 202. The rates that BellSouth offers for high-capacity loops

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[1] The GPSC's determinations, as shown below, included line sharing, based on the GPSC's independently erroneous presumption that access to the high-frequency portion of the local loop ("HFPL") is a section 271 network element.

[2] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 at 3906, ¶ 473 ("*UNE Remand Order*"), *vacated and remanded, USTA v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied,* 538 U.S. 940 (2003).

and transport offered under section 271 are BellSouth's tariffed rates for equivalent special access services – rates that are definitively "just and reasonable." The GPSC's suggestion that the Commission can revise tariffed rates in the context of a declaratory ruling based on an adopted record developed before a state public service commission utterly lacks legal support. In short, it is an invitation to the Commission to operate – as the GPSC has – outside of its authority. The Commission should decline this invitation.

BACKGROUND

A. Statutory and Regulatory Framework.

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), requires incumbent local exchange carriers ("incumbent LECs" or "ILECs") such as BellSouth to allow competitive LECs to lease unbundled network elements (or "UNEs").[3] The 1996 Act assigns the Commission the duty to determine which network elements will be subject to unbundling (and thus become UNEs). The Commission may require an incumbent LEC to provide access to (*i.e.*, "unbundle") an element only if it determines that competitive LECs would otherwise be "impair[ed]" in their ability to provide service.[4]

On three separate occasions from 1996 through 2003, the Commission issued orders that imposed "blanket" unbundling.[5] With very limited exceptions, the Commission's unbundling orders required ILECs such as BellSouth to make available as UNEs – and thus at artificially low regulated rates – *all* of the basic piece-parts of their local voice networks in all geographic locations. ILECs were required to allow CLECs access to switching, loops, and transport to

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3 47 U.S.C. § 251(c)(3).

4 47 U.S.C. § 251(d)(2).

5 *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

serve essentially all of their customers.[6] Each time the Commission sought to impose blanket unbundling, the federal courts vacated the Commission's decision as inconsistent with the 1996 Act.[7]

The Commission's February 2005 *Order on Remand* finally prohibited UNE access to switching nationwide and to high-capacity loops and transport in some wire centers.[8] Because of the "need for prompt action," the Commission made its new rules effective on March 11, 2005.[9] The Commission established specific transition periods during which time CLECs were to migrate to alternative serving arrangements.

In establishing its transition periods, the Commission made clear that negotiated agreements, and thus market-based rates, should govern at the end of the transition period. Specifically, this Commission reasoned that "the twelve-month period" from March 11, 2005, to March 11, 2006, "provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, *negotiating alternative access arrangements*, and performing loop cut overs or other conversion."[10] Likewise, this Commission made clear CLECs should migrate from former UNE high capacity loops and transport facilities to "alternative facilities or arrangements,

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6 *See, e.g., id.* at 389-91.

7 *See Iowa Utils. Bd.*, 525 U.S. at 388-91; *USTA I,* 290 F.3d 415; *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert denied*, 125 S. Ct. 313, 316, 345 (2004). Federal courts likewise rejected the Commission's attempt to create a HFPL UNE – a UNE that was created in 1999, and that was never a part of the Section 271 checklist.

8 Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2575-76, 2641, 2653 and 2666, ¶¶ 142, 195-99, 218, 220, 227 and 235 (2005) ("*Order on Remand*" or "*TRRO*"), *petitions for review pending, Covad Communications Co., et al.*, Nos. 05-1095, *et al.* (D.C. Cir.).

9 *Id.* at 2666, ¶ 235.

10 *Id.* at 2660, ¶ 227 (emphasis added).

including self provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent LEC."[11] This Commission made no mention of setting rates for de-listed network elements – either by the Commission or state public service commissions – that would apply at the end of the transition period.

Pursuant to section 271 of the Act, this Commission is authorized to grant a BOC's application to provide long distance in a given state, provided the BOC satisfies statutory criteria designed to confirm that the local market in the state is open to competition.[12] Those criteria include a showing that the BOC satisfies the "competitive checklist" – *i.e.*, a list of services and facilities that the BOC must make available to CLECs operating in the state. 47 U.S.C. § 271(c)(2)(B). That list includes, among other elements "local loop transmission from the central office to the customer's premises," and "local transport from the trunk side of a wireline local exchange carrier switch."[13]

Notably missing from the section 271 checklist elements is "line sharing," that is, access to the high-frequency portion of the ILEC's local loops.[14] Such unbundled access first was required by the Commission, erroneously, in 1999.[15] After the D.C. Circuit vacated the line sharing requirement in *USTA I*, the Commission declined to re-impose the requirement in the

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11 *TRRO* at 2641, 2575-76, ¶¶ 195 *and* 142 (referring specifically to special access services).

12 *See AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000).

13 *See id.* § 271(c)(2)(B)(iv)-(vi).

14 *See id.*

15 Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*").

Triennial Review Order.[16] The Commission established a transition period for carriers to adjust their business practices and arrangements in compliance with its decision and set an October 2, 2004 cut-off date after which ILECs could not be required to provide new line-sharing arrangements.[17] Thus, in addition to being explicitly absent from section 271's checklist elements, line sharing was fully eliminated as a UNE under section 251 in October 2003, with no new customers permitted after October 2004.

The Commission has held that the obligations of the section 271 competitive checklist continue after a BOC obtains long-distance authority in a given state (as BellSouth has done in Georgia), and even after the Commission determines that the element need not be made available under section 251.[18] But, when the Commission has determined that an element required under section 271 is not required to be unbundled under section 251, the relevant regulatory rules change in two important ways. First, only this Commission, not the state commissions, has jurisdiction to determine whether a BOC such as BellSouth remains in compliance with section 271.[19] As this Commission has explained, Congress granted it "sole authority" "to administer" section 271.[20] By contrast, Congress expressly limited the states' role to *advising* the

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16 *See USTA I*, 290 F.3d at 429; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17384-86, ¶¶ 255-266 ("*Triennial Review Order*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S.C. 313, 316, 345 (2004).

17 *See Triennial Review Order* at ¶¶ 264-65.

18 *See Triennial Review Order* at 17384-86, ¶¶ 653-55, and at 17389-90, ¶ 665.

19 *See* 47 U.S.C. § 271(d)(3), (6).

20 Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 at 14400-01, ¶¶ 17-18 (emphasis added) ("*InterLATA Boundary Order*").

Commission in connection with an application for section 271 authorization.[21] There is no provision in section 271 that gives states *any* implementation authority as to the requirements of that section.

And second, the rate that applies to elements provided under section 271 is *not* the low, regulated rate that applies to section 251 unbundled elements, or some derivatively crafted regulated rate. Rather, as noted above, for these purposes, the Commission has concluded that BOCs could demonstrate that the market price should prevail – "as opposed to a regulated rate."[22]

B. The GPSC Proceedings.

The GPSC's Petition provides a high-level summary of the background leading to the instant Petition, but omits key facts. In relevant part, the GPSC accurately notes that the docket giving rise to this petition was established in 2004, shortly after the D.C. Circuit issued its decision in *USTA II*. The GPSC fails to point out, however, that BellSouth requested the adoption of a procedural and scheduling order that called for testimony and hearings to occur in late 2004 so that changes in BellSouth's *section 251* obligations could be properly implemented in BellSouth's interconnection agreements. BellSouth's request was entirely consistent with this Commission's guidance in its *Interim Order*.[23]

The GPSC elected not to proceed with a hearing in 2004. Instead, following the issuance of the *Order on Remand*, the GPSC issued an order requiring BellSouth to continue to provide

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21 *See* 47 U.S.C. § 271(d)(2)(B).

22 *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473.

23 See Unbundled Access to Network Elements , WC Docket No. 04-313, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers , CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 , 2004 WL 1900394, (rel. Aug. 20, 2004) (Triennial Remand Interim Order and NPRM), 19 FCC Rcd 16783.

UNE access for switching and high capacity loops and transport facilities in unimpaired wire centers after March 11, 2005, despite the issuance of binding federal rules to the contrary.[24] Ultimately, the federal district court enjoined the GPSC's decision and the Eleventh Circuit Court of Appeals affirmed that determination, because, as both courts concluded, it contravened the clear intent of this Commission's *Order on Remand*.[25]

On June 1, 2005, BellSouth filed its Motion for Summary Judgment with the GPSC. That motion specifically addressed Issue 8(a), which involved whether a state commission has authority under state or federal law to require BellSouth to include in its interconnection agreements entered into pursuant to section 252. BellSouth argued that Issue 8(a) posed a purely legal question of state commission authority and that it should be resolved by a conclusion that this Commission, and not the GPSC, had exclusive authority over Section 271.

Instead of ruling on this motion, the GPSC proceeded to conduct an evidentiary hearing from August 30 to September 1, 2005 on a number of issues arising from this Commission's

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[24] *See* Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders, *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, at 3-7 (Ga. Pub. Serv. Comm'n Mar. 9, 2005).

[25] *See BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005), *aff'd*, 425 F.3d 964 (11th Cir. 2005). The GPSC's present erroneous reading of section 271 is not the first time it has misinterpreted the 1996 Act. As further example, a 2003 decision by the GPSC establishing rates for unbundled network elements was overturned as being arbitrary and capricious and in violation of the 1996 Act. *See* Order, *BellSouth Telecomms., Inc. v. Georgia Pub. Serv. Comm'n.*, No. 03-CV-3222-CC (N.D. Ga. Apr. 6, 2004), aff'd 400 F.3d 1268 (11th Cir. 2005). And, this Commission preempted a decision of the GPSC (and other state commissions) requiring BellSouth to provide DSL service to an end user customer over the same unbundled loop leased by a CLEC, finding that such a requirement was inconsistent with the Commission's unbundling rules and ran afoul of the appropriate state role in implementing unbundling policies under the 1996 Act. *See* Memorandum Opinion and Order and Notice of Inquiry, *In re: BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251 (FCC March 25, 2005), 20 FCC Rcd 6830.

Order on Remand and the *Triennial Review Order.* In its brief filed after that hearing, BellSouth reiterated its argument that only this Commission, and not the GPSC, had authority to implement section 271.

On January 20, 2006, the GPSC issued its *Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271.*[26] In that order, the GPSC concluded that it had authority to set rates for facilities that BellSouth was required to make available only under section 271. The GPSC contended that, "[b]y setting rates," it would not be "enforcing Section 271," a role that the GPSC conceded Congress granted to this Commission under section 271(d)(6).[27] The GPSC argued that, instead of enforcing section 271, it was "setting just and reasonable rates for de-listed unbundled network elements."[28]

The GPSC, however, could cite no provision of federal law that authorized it to set rates for facilities that need only be made available under section 271 or, like line sharing, are not required under section 271 at all. Instead, the GPSC relied upon a district court decision from Maine that denied a preliminary injunction on the basis that the 1996 Act "did not intend to preempt state regulation of Section 271 obligations."[29] That decision, like the GPSC's order, however, did not identify any affirmative source of authority for a state commission to set rates for the purposes of this provision of federal law.

Based on these conclusions, the GPSC decided that it was reasonable to conduct a *second* round of hearings on the issue of just and reasonable rates for the de-listed network elements at

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[26] Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, *Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. PSC Jan. 20, 2006).

[27] *Id.* at 4.

[28] *Id.*

[29] *Id.* at 5 (citing *Verizon New England Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Comm'n*, 403 F. Supp. 2d 96 (D. Me. 2005)).

issue. Soon thereafter, BellSouth filed a complaint in federal district court challenging the GPSC's assertion of authority to set rates for facilities that must be made available solely under section 271.[30]

The GPSC then proceeded with its "271 hearing" and on March 2, 2006 voted, by a 3-2 margin, to set rates for local switching. The GPSC also voted unanimously to set rates for high capacity loops and transport and, after determining that line sharing was a part of BellSouth's section 271 checklist obligations, set rates for line sharing.[31] The GPSC issued an *Order on Reconsideration* on March 24, 2006. In that order, the PSC reversed its adoption of switching rates – again by a 3-2 vote – but voted unanimously to preserve its rates for high capacity loops and transport and line sharing.

ARGUMENT

A. The GPSC Has No Jurisdiction to Set Rates for De-Listed Elements.

Under the plain terms of the 1996 Act, the GPSC has no authority whatsoever to set rates for section 271 checklist elements or elements, like line sharing, which are not required under section 271. The text of the statute thus compels rejection of the GPSC's Petition.

1. Section 271 provides that a BOC may obtain permission to conduct long-distance service by "apply[ing] to the [FCC]," and that "the [FCC] . . . approv[es]" that application.[32] During the application process, state commissions are afforded no role other than to be "consult[ed]" by the FCC.[33] Moreover, when, as here, the BOC has *already* received approval,

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30 *BellSouth Telecommunications, Inc. v. Georgia Public Serv. Comm'n*, No. 1:06-CV-0162-CC (N.D. Ga.).

31 *Id.* at 7.

32 47 U.S.C. § 271(d)(1), (3).

33 *Id.* § 271(d)(2)(B).

the statute vests enforcement of any ongoing obligations in the Commission alone.[34] Simply put, there are two administrative roles under section 271 – approving applications and determining post-approval compliance in response to a formal complaint – and Congress granted both those statutory duties to this Commission. State commissions have no duties under section 271 other than the mere consultative role Congress gave them at the approval stage.

In accord with this clear statutory assignment of responsibility, both the Commission and the courts have repeatedly recognized that Congress granted "*sole authority* to the [FCC] to administer . . . section 271."[35] The D.C. Circuit has similarly made clear that "Congress has clearly charged the FCC, and not the State commissions," with determining whether a BOC has complied with section 271.[36] The Seventh Circuit, likewise, has explained that states may not "parlay" their "limited role" of consulting on section 271 approvals into authority to impose substantive requirements.[37] In sum, as one federal court has noted, "it is the prerogative of the FCC . . . to address any alleged failure by [a BOC] to satisfy any statutorily imposed conditions to its continued provision of long distance service."[38] For these reasons, two federal courts – and the overwhelming majority of state commissions – have already concluded that section 271 does *not* authorize state commissions to impose unbundling obligations.[39]

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34 *See id.* § 271(d)(6).

35 *InterLATA Boundary Order,* 14 FCC Rcd at 14392, ¶¶ 17-18 (emphasis added).

36 *SBC Communications v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

37 *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

38 *BellSouth Telecomms., Inc. v. Mississippi PSC*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005).

39 *See id. See also BellSouth Telecomms., Inc. v. Cinergy Commc'ns Co.*, No. 03:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005) slip op. at 12 ("The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first").

The absence of state commission authority to implement section 271 is strongly confirmed by the text of section 252, which is the *only* statutory provision that gives state commissions *any* authority to arbitrate interconnection agreements between ILECs and CLECs and, even more to the point, the only provision that authorizes state commissions to establish rates for access to network facilities. Section 252 repeatedly makes clear that state commission authority is limited to implementing *section 251*, which the GPSC does not – and cannot – argue imposes the duties at issue here and which gives the states *no* authority over the independent obligations imposed by section 271. In particular, section 252 authorizes state commissions to resolve only those "open issues" that remain after the parties negotiate "a request for interconnection, services, or network elements *pursuant to section 251*."[40] In resolving those issues, the state commission must "ensure that such resolution . . . meet[s] *the requirements of section 251* of this title, including the regulations prescribed by the [Commission] pursuant to section 251 of this title."[41] Similarly, in reviewing the resulting interconnection agreement, the state commission must approve the agreement to ensure it "meet[s] *the requirements of section 251* of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title."[42]

Of particular relevance here, Congress was explicit that a state commission may set rates *only* "for purposes of" *section 251*.[43] Thus, as the Commission has explained, with respect to state commissions' authority to set rates for network elements, section 252 is "quite specific" and

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40 47 U.S.C. § 252(a)(1), (b)(1) (emphasis added).

41 *Id.* § 252(c)(1) (emphasis added).

42 *Id.* § 252(e)(2)(B) (emphasis added).

43 *See id.* § 252(d)(1) and (c)(2).

"*only* applies for the purposes of implementation of section 251(c)(3)."[44] Congress could easily have granted state commissions the authority to set rates "for purposes of section 251 and section 271," but it did not do so. That clear congressional intent must be given effect.

In accord with this overwhelming textual evidence, the Fifth and Eleventh Circuits have concluded that a state commission may not, without agreement by the parties, expand the scope of arbitration beyond implementing the requirements of section 251.[45] Indeed, the Eleventh Circuit explained, if ILECs were required to negotiate (and, if necessary, arbitrate) items that go beyond the section 251 requirements (which are the only ones expressly referenced in section 252), there would be "effectively no limit on what subjects the incumbent must negotiate," a result "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate."[46]

These clear limitations on the state commissions' authority under section 271 have led the overwhelming majority of state commissions, at least two dozen in all, to concede that they lack authority to implement section 271.[47] As the Florida Public Service Commission recently explained, "[u]pon thorough analysis of FCC orders, the Act, case law, and the record in this proceeding, we find that this Commission does not have authority to require BellSouth to include in §252 interconnection agreements §271 elements."[48] The Indiana Commission has similarly explained that it joined "the many courts and commissions that have already held that Section

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44 *Triennial Review Order,* 18 FCC Rcd 16978, ¶ 657 (emphasis added).

45 *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002); *Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003).

46 *MCI Telecomms.*, 298 F.3d at 1274 (citing 47 U.S.C. § 251(b), (c)).

47 *See* Exh. A.

48 Order, *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, at 52 (Fla. PSC Mar. 2, 2006).

271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271."[49]

2. The foregoing discussion and argument apply with particular force to the GPSC's setting of line sharing rates. The other elements at issue in this matter – high-capacity loops and transport that BellSouth must provide in wire centers where CLECs are not impaired without access to such facilities as UNEs under section 251 are checklist elements under section 271. Thus, upon their de-listing by the Commission for section 251 purposes, the section 271 requirements remain, as the Commission has ruled, and the issue of how rates are to be determined arises. But that is hardly the case for line sharing, which was not "de-listed," but rather was *repudiated* by the Commission (after D.C. Circuit vacatur of the requirement) as a UNE altogether.

The only time the Commission addressed the issue of whether line sharing could be considered part of the section 271 checklist, it held that it would be a requirement under "checklist items 2 and 4" *because* the 1999 *Line Sharing Order* had "defined the high-frequency portion of local loops as a UNE."[50] But, the viability of that legal premise evaporated once the D.C. Circuit vacated the line sharing requirement and the Commission refused to resurrect it on any other section 251(c)(3) basis.

Line sharing – first and foremost – is *not* an explicit checklist element (*i.e.*, access to the HFPL is not required under item 4's local loop transmission element).[51] Nor is there any

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[49] Order, *Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, at 35 (Indiana URC Jan. 11, 2006).

[50] Memorandum Opinion and Order, *Application of Verizon New England Inc.*, 16 FCC Rcd 8988, ¶ 163 (2001).

[51] *See Triennial Review Order*, ¶¶ 255, 653-654; 47 U.S.C. § 271(c)(2)(B)(iv).

credible argument after the *TRO* and *USTA II* that can shoe-horn line sharing into the section 271 checklist *via* item 2's requirement of "non-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[52] Thus, even the otherwise improper section 271 fig leaf that the GPSC attempts to use to cover its decision to set rates for loops and transport disappears when the discussion shifts to line sharing.

B. The GPSC's Attempt to Assume Section 271 Ratemaking Authority Is Based on Flawed Analysis and A View of Preemption That Has Been Soundly Rejected.

None of the arguments made by the GPSC in its petition overcome the clear language in the 1996 Act and the overwhelming wall of contrary precedent from this Commission, the federal courts, and other state commissions.

1. As an initial matter, the GPSC cannot avoid the clear text of the 1996 Act by claiming that setting rates for items under section 271 is not the same as "enforcing" section 271.[53] That is mere wordplay. As noted above, section 271 authorizes only two kinds of regulatory actions: approving long-distance entry and adjudication of post-approval compliance complaints. Congress gave both those tasks to the Commission; it gave *no* authority to state commissions to implement this statutory provision, but merely gave them an advisory role strictly limited to a *pre-approval* advisory opinion, and *not post-approval compliance*. The GPSC's has no authority to impose obligations under section 271 – period. Its attempt to arrogate that authority to itself is thus unlawful regardless whether the PSC chooses to call it "enforcement," "implementation," or anything else, and the GPSC's notion that the federal court and FCC decisions noted above would have come out differently if a state commission had assigned a different label to its actions is without substance.

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52 *See* 47 U.S.C. § 271(c)(2)(B)(ii).

53 Petition at 2. *Order Setting Rates* at 2.

2. The GPSC's claim that section 271 does not "preempt" a state commission's authority to set rates for purposes of that provision is based on fundamental misunderstanding of law. The issue here is not whether the states have "traditional authority" over "local telephone service" – a point that, as discussed below, is irrelevant to section 271, which relates to the provision of interLATA services, in any event.[54] Rather, the question is whether the GPSC has authority to set rates for purposes of a particular *federal* statute. The answer to that question is clear: states have no inherent authority to implement such provisions of federal statutory law; rather, they have only the authority that Congress has expressly granted to them. As the Eighth Circuit has explained, "[t]he new regime [under the 1996 Act] for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state, law.*"[55]

Likewise, as the Supreme Court observed, it is now federal, not state law that governs the issues addressed by the 1996 Act, and the relevant issue is thus what authority that *federal* statute has explicitly given to the states (and, in that case, what limitations Congress placed on that authority):

> *But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new federal regime is to be guided by federal-agency regulations.* If there is any 'presumption' applicable to this question, it should arise from the fact that a *federal* program administered by 50 independent state agencies is surpassing strange.[56]

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54 Petition at 4.

55 *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F. 3d 942, 947 (8th Cir. 2000) (emphasis added).

56 *Iowa Utils. Bd.*, 525 U.S. at 378, n.6 (emphasis in original).

In accord with these cases, the Commission, in the related LATA boundaries context, has specifically relied on congressional silence in the 1996 Act as to the grant of state jurisdiction as proof of the non-existence of that authority. After noting that LATA boundaries had historically been a federal concern, the Commission stressed that the 1996 Act "does not provide for any state jurisdiction over LATAs whatsoever."[57] Then, specifically highlighting the "exclusive authority that Congress intended that the Commission exercise over the section 271 process," the Commission concluded that "*the 1996 Act's silence regarding state jurisdiction, rather than implicitly allocating jurisdiction to the states, assures that Commission jurisdiction is not superseded.*"[58] The same analysis applies here. States have no underlying authority to implement section 271, and thus the lack of any explicit authority to implement that provision is dispositive of the GPSC's claim here.

That is especially true because section 271 involves the requirements to provide interLATA services, *not*, as the GPSC wrongly contends, the states' "traditional regulation of local telephone service."[59] As this Commission emphasized in the *InterLATA Boundary Order* discussed above, regulation of interLATA service has historically been a *federal*, not a state duty. Before the 1996 Act, interLATA limitations were supervised by a *federal* district court under the Modification of Final Judgment that ended the AT&T antitrust case.[60] The 1996 Act simply transfers that role from one federal actor (the court) to another (this Commission). Thus, unlike in *Iowa Utilities Board*, in this context there is not even a history of state authority that was overturned by the 1996 Act.

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57 *InterLATA Boundary Order,* 14 FCC Rcd 14392, ¶ 18.

58 *Id.* (emphasis added).

59 Petition at 4.

60 *See United States v. AT&T Co.*, 552 F. Supp. 131, 231 (D.D.C. 1982).

The district court decision from Maine upon which the GPSC relies is incorrect for the same reason that the GPSC's argument fails: that tentative court decision (it resolved only a preliminary injunction issue; merits briefing is currently underway) relies on a "preemption" theory that assumes that states have some inherent authority to set rates for purposes of a federal-law provision. For all the reasons discussed above, states do not possess any authority to implement federal law that could even be "preempted" in this context.[61]

Furthermore, *Verizon New England* is readily distinguishable. Verizon, in an effort to obtain the Maine PUC's recommendation that the Commission approve Verizon's long distance entry, agreed to file with the Maine PUC a wholesale tariff covering its unbundling obligations. Part of that agreement, the Maine PUC alleged, was that the wholesale tariff would include "all of Verizon's wholesale obligations, both those under § 251 as well as those under § 271 of the Act."[62] The Maine PUC treated Verizon's agreement as express consent to the PUC's review of the tariff for section 271 compliance purposes.[63] Although BellSouth does not concede that the *Verizon New England* facts warranted the outcome in that case, it is clear that the Maine district court found the Verizon-Maine PUC wholesale tariffing agreement to be significant.[64] There is no doubt (and, indeed, the GPSC does not suggest otherwise) that BellSouth never made any of the kinds of commitments alleged to have been made by Verizon, and the GPSC never set the rates in issue on the basis of any such understanding.

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61 *See Verizon New England, Inc. v. Maine PUC*, 403 F.Supp.2d 96 (2005).

62 *Verizon New England,* 403 F.Supp.2d at 100.

63 *Id.*

64 *See id.* at 105 (". . . the Court concludes that § 271 is not considered by the FCC and was not intended by the Congress to exclude the PUC *in the circumstances of this case* from all activity in setting rates under § 271") (emphasis added).

3. Finally, the GPSC is wrong in contending that the "framework" of the 1996 Act supports its assertion of authority to set rates here.[65] The GPSC reasons as follows: a BOC applicant for long-distance authority under section 271 is permitted to establish that it makes available each item on the "competitive checklist" by "providing access and interconnection pursuant to at least one section 252 interconnection agreement, or by offering access and interconnection pursuant to a Statement of Generally Available Terms ("SGAT")."[66] Because state commissions must "approve or reject interconnection agreements pursuant to section 252(e)," or approve SGATs under section 252(f), the GPSC reasons, the state commissions allegedly have a "role . . . [to] fulfill pursuant to the [Act that] bears upon a BOC's continued satisfaction of the conditions of section 271."[67]

The GPSC's analysis is erroneous for at least two reasons. *First*, as discussed above, the Commission has exclusive jurisdiction to administer and enforce section 271. Thus, even if the GPSC could establish that, for purposes of section 271, there was some deficiency in the interconnection agreements that the GPSC has approved under section 252, any complaint on that score must be made to the Commission, not the GPSC.[68]

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65 Petition at 11.

66 *See* Petition at 5, 7-9; *Second PSC Order* 2-4 ("the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271").

67 Petition at 10.

68 *See BellSouth v. Miss. PSC*, 368 F. Supp. 2d at 566; *BellSouth v. Cinergy*, slip op. at 12-13 ("The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first"); Order Dissolving Temporary Standstill, *Competitive Carriers of the South, Inc.*, Docket 29393, 2005 Ala. PUC LEXIS 126, at *42-*43 (Ala. PUC May 25, 2005) ("the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 . . . rests with the FCC and not this Commission"). *See also Triennial Review Order*, 18 FCC Rcd at 17389-90, ¶ 665 ("In the event a BOC has already received section 271 authorization, section 271(d)(6) *grants the Commission enforcement authority* to ensure that the BOC continues to comply with the market opening requirements of section 271") (emphasis added).

Second, section 271 says nothing that can be read or construed to confer upon state commissions the *authority to arbitrate rates* for services and facilities that must be provided under section 271, not section 251. Rather, that section provides simply that a BOC is eligible to seek long-distance relief under section 271 if it has "*entered* into one or more" agreements "that have been *approved* under section 252" and that contain terms and conditions for each item on the competitive checklist.[69] On its face, that provision is satisfied by (among other things) the existence of a *single*, *voluntarily negotiated* agreement that has been approved by a state commission and under which a BOC makes available the items on the competitive checklist at a just and reasonable rate. On no theory could that limited statutory reference to state commission "approv[al] under section 252" vest authority in the GPSC to *arbitrate* disputes and thereby establish terms and conditions, including rates, for *all* section 271 checklist items for *every* CLEC in the state.

That is particularly so in view of the limitations set forth in section 252 itself. As discussed above, section 252 carefully and specifically authorizes state commissions to set rates *only* "for purposes of" section 251.[70] Equally important, the state commission is mandated to "approve" any agreement that "meet[s] the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251."[71] State commissions are

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69 47 U.S.C. § 271(c)(1)(A) (emphases added). *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9024, ¶ 11 (2002) ("To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of 'telephone exchange service . . . to residential and business subscribers. . . . The Commission has further held that a BOC must show that at least one 'competing provider' constitutes 'an actual commercial alternative to the BOC . . . .'").

70 47 U.S.C. § 252(d)(1), (c)(2).

71 *Id.* § 252(e)(2)(B).

thus foreclosed both from setting rates outside the scope of section 251 and from considering matters outside the scope of section 251 in approving agreements. The GPSC's position to the contrary, thus, is fatally flawed.

C. The GPSC's Request for Alternative Relief Violates the Framework Applicable to Section 271 Elements.

The GPSC has requested that, even if it lacked authority to set rates under section 271, this Commission should "affirm that the rates ordered by the GPSC are just and reasonable."[72] Even if it were appropriate for this Commission to determine whether specific rates are "just and reasonable" in the context of a declaratory ruling proceeding – and it is not, as discussed below – the GPSC's rates are necessarily unlawful.

An element that is required only under section 271 is subject to the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the Communications Act.[73] According to the Commission, a BOC may satisfy sections 201 and 202 simply by, among other things, "showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate," or by "demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." BellSouth made this showing, since the rates that BellSouth offers for high-capacity loops and transport provided under section 271 are the tariff rates at which BellSouth provides equivalent special access services. Thus, BellSouth's rates are, by definition, "just and reasonable."

Nevertheless, the GPSC took it upon itself to reduce rates that were, by definition, "just and reasonable." The GPSC did so by setting rates for high-capacity loops and transport starting

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72 Petition at 12.

73 *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 663.

with BellSouth's costs for the equivalent UNE facility using the Commission's TELRIC methodology, and then adding an adjustment for overhead.[74] The premise of the GPSC's exercise was that the "just and reasonable" standard requires that rates be cost-based, which is not the case. This is clear from *Competitive Telecommunications Ass'n v. FCC,*[75] in which the D.C. Circuit rejected a challenge to "market pricing" of DS1 and DS3 local transport provided by local exchange carriers, the rates for which the Commission decided would be deemed "just and reasonable" if based upon the DS1 and DS3 special access rates that were already in effect. While these rates were admittedly not "cost-based," the D.C. Circuit upheld the Commission's decision and, in so doing, noted that the just and reasonable standard under section 201(b) does not require the establishment of "purely cost-based rates."[76]

The Commission as well as the courts has made clear that the "just and reasonable" standard is a pricing framework which does not compel the use of any single pricing formula (whether based on historical cost or anything else).[77] The Commission has recognized that it "has frequently used rate comparisons, benchmarks, and other non-cost factors to evaluate the

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74 *See* Petition at 11.

75 87 F.3d 522 (D.C. Cir. 1996).

76 87 F.3d 522 (*citing National Ass'n v. of Regulatory Utility Commissioners v. FCC,* 737 F.2d 1095, 1137 (D.C. Cir. 1984)); *see also National Rural Telecom Ass'n v. FCC,* 988 F.2d 174, 182-183 (D.C. Cir. 1993) (affirming price cap regulation although not tied directly to cost).

77 *See, e.g., Florida Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944) ("Under the statutory standard of 'just and reasonable' it is the result reached not the method employed that is controlling"); *see also Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 501 (2002) (noting "that responsibility for 'just and reasonable' rates leaves methodology largely subject to discretion"); Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968) ("We must reiterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties"). Neither *Hope Natural Gas* nor *Verizon* stands for the proposition that the just and reasonable pricing standard requires that rates bear some relationship to cost, as the GPSC clearly believes.

justness and reasonableness of rates ...," noting its "broad discretion in selecting methods to evaluate the reasonableness of rates."[78]

The Commission's decision in *AT&T Corp. v. Business Telecom* is particularly instructive. In that case the Commission granted in part a complaint by AT&T and Sprint finding that access rates charged by Business Telecom, Inc. ("BTI") were unjust and unreasonable. In so doing the Commission assessed "the reasonableness of BTI's access rates by evaluating the market for access services, rather than by ascertaining BTI's costs of providing access service."[79] The Commission concluded that it was neither "necessary" nor "appropriate" to examine BTI's costs in determining whether its rates were just and reasonable.[80]

The Commission determined that examining BTI's costs as the "touchstone" of the reasonableness of BTI's rates would run afoul of the "policies and purposes of the 1996 Act," which rely upon "market factors to dictate appropriate rates."[81] The same is true for assessing the rates charged by BellSouth for de-listed elements provided under section 271 (let alone for elements, like line sharing, that are not even required under section 271). Because CLECs are not impaired without unbundled access to high capacity loops and transport in certain wire centers, the rates that BellSouth charges for these facilities provided under section 271 should be judged based upon market factors rather than upon an evaluation of BellSouth's costs. The Commission has recognized as much, making clear that, under sections 201 and 202, "the market

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78 *In re: AT&T Corp. v. Business Telecom, Inc.,* 16 FCC Rcd 12312, 12324 (May 2001).

79 16 FCC Rcd at 12321.

80 *Id.* at 12333.

81 *Id.* at 12322.

price should prevail" – "as opposed to a regulated rate" of the type that the GPSC imposed – with respect to de-listed elements subject to the section 271 checklist.[82]

Indeed, this Commission has made clear that, as to high-capacity loops and transport, one of the viable transition options (including self-supply and obtaining services at wholesale) for CLECs was to obtain these services by purchasing them out of BellSouth's interstate access tariffs. This finding was completely consistent with paragraph 664 of the *TRO,* which clearly contemplated such alternatives. What the GPSC did, however, was to establish rates that are *below* special access rates that have been filed in accordance with this Commission's regulations requiring just and reasonable rates for special access. This violates both the Act and the Commission's orders.

D. The GPSC's Request, Alternatively, That the Commission Set Section 271 Checklist Element Rates Should not be Entertained.

The GPSC asks the Commission to do one of three things, in descending order: (1) "declare" that the GPSC was not preempted from setting rates for the checklist elements at issue; or (2) if the GPSC was preempted, "declare" that the rates the GPSC set were just and reasonable; or (3) if the GPSC's rates were not just and reasonable, then "set just and reasonable rates for BellSouth to charge in Georgia for high capacity loops and transport and line sharing based on the portions of the record" from the GPSC proceedings attached by the GPSC to its Petition.[83] The first two requests are flawed for the reasons discussed above. The last alternative request, which BellSouth now addresses, is equally flawed.

The GPSC cites no authority, nor presents any discussion, of the premise upon which the Commission should "set" rates for the checklist elements at issue. The Commission's authority

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82 *UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473.

83 *See* Petition at 11-12.

to enforce section 271 conditions is confined to the "review of complaints concerning *failures* by [BOCs] to meet conditions required for approval" of their long distance applications.[84] Thus, there must first be a "failure" by a BOC to do something it was required to do as a condition for long distance entry *before* the Commission's enforcement jurisdiction under section 271 is properly invoked. Here, there is no such allegation – nor can there be – that BellSouth has violated its section 271 requirements.

The central claim in any cognizable request for relief would have to be that *BellSouth's charges violate* applicable legal standards, which would not entail the affirmation of the GPSC's *pre-emptive* establishment of those rates, or the *pre-emptive* establishment of those rates by the Commission, especially without there being any demonstration that BellSouth has done something the Act forbids, or failed to so something the Act compels.[85]

The GPSC's failure to allege any Act violation by BellSouth negates the Commission's ability to investigate the merits or otherwise craft a proper remedy *for any such violation.* Thus, putting aside the question of whether the Commission should, or even could, "set" the rates for checklist elements in Georgia on a declaratory or other basis, as the GPSC has requested, the GPSC has made no effort to show that doing so is a proper remedy for anything BellSouth has done, or failed to do, in contravention of any provision of the Act.

Finally, even if the Commission were to find a preemptive rate-setting inquiry appropriate, the Commission should decline to reach the merits of the GPSC's Petition on a declaratory basis because such proceedings are ill-suited to the kind of review necessitated by the subject matter. The Commission has stated, appropriately, that its authority under section 271 to

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[84] 47 U.S.C. § 271(d)(6)(B) (emphases added).

[85] *See, e.g.*, 47 U.S.C. § 208(a) ("Any person . . . complaining of *anything done or omitted to be done* by any common carrier subject to this chapter, *in contravention* of the provisions thereof . . .").

consider the question of whether a particular checklist element's rate satisfies the just and reasonable pricing standard of sections 201 and 202 is:

> . . . a *fact-specific inquiry* that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). . . . In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271.[86]

Thus, the Commission has indicated that it would typically consider such claims following its accelerated complaint procedures. That logic applies with particular force to the fact-intensive issues inherent in a rate-setting inquiry.

Complaint proceedings provide the only proper framework for the resolution of the granular issues associated with determining whether, or what rates are just and reasonable.[87] It is in such proceedings, not a declaratory ruling proceeding in which a state commission has purported to provide "portions of the record," Petition at 12, that the Commission can make the "fact-specific inquiry" that would permit it to determine properly whether BellSouth's rates are just and reasonable. Here, however, the GPSC seeks to short-circuit any proper independent investigation by the Commission by asking the Commission to "adopt" portions of a record made before the GPSC in proceedings in Georgia. This cannot be the "fact-specific inquiry" to be undertaken by the Commission that it spoke of in the *Triennial Review Order* on this very subject.

CONCLUSION

The plain language of section 271 and the Commission's orders interpreting section 271 limit state regulatory authority to those elements unbundled pursuant to section 251 and not those

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86 *Triennial Review Order*, 18 FCC Rcd at 17389, ¶¶ 664-65.

87 *See, e.g.*, 47 C.F.R. § 1.736(a) and (b) (regarding enforcement under 47 U.S.C. § 271(d)(6)(B)).

provided pursuant to section 271. A state commission's assertion of jurisdiction over elements provided pursuant to section 271 would "thwart or frustrate" the federal regime set forth in the *Triennial Review Order*.[88] The Act requires that "the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[89] The GPSC has intruded upon that federal policy by presumptively setting rates without regard to this Commission's guidance – guidance which calls for CLECs to self-provide facilities, purchase facilities out of access tariffs, or enter into commercial agreements.

The Commission has held that as a matter of national policy, it retains exclusive jurisdiction to regulate elements provided pursuant to section 271. By asserting jurisdiction over such elements, the GPSC has displaced the federal public interest determination as to how the local networks should be regulated and thwarted the implementation of that regulatory scheme. The GPSC's action is especially troubling given its tenuous reversal on switching rates – a reversal that will have no practical impact if this Petition is granted and one that threatens the hundreds of commercial agreements already in force.

For these reasons, the Commission should make it abundantly clear that state commissions lack authority under the Act to set rates for de-listed UNEs that otherwise remain subject to Section 271 checklist requirements. The Commission should reject the GPSC's attempt to reincarnate access to the HFPL. And, the Commission should reject the GPSC's attempt at rate-setting under Section 271 for failing to meet the Act's standards of "just and reasonableness" in this context. Finally, the Commission should refuse to assert jurisdiction over

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[88] Importantly, lack of state jurisdiction does not deprive CLECs of a forum to challenge rates; that forum, however, is the Commission.

[89] *Triennial Review Order* at 16978, ¶ 656.

the GPSC's request that the Commission set rates under applicable Act standards based on the record made before the GPSC.

Respectfully submitted,

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Decisions Finding No State Jurisdiction over Section 271 Elements

STATE	Date Ordered	271 Ruling on Commercial Agreements
Alabama	05/25/2005	"[T]he ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission." *Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief*, Alabama Public Service Commission Docket No. 29393 (May 25, 2005).
	04/20/2006	"Given the fact that the Commission's sole authority to review interconnection agreements is derived from §252 and the interplay between §§ 251 and 252, it does not appear that the Commission has the requisite jurisdiction to compel the inclusion of the § 271 elements in dispute in this proceeding in interconnection agreements that are submitted to the Commission for its review pursuant to § 252. Further, there appears to be no express or implied obligation on the part of BellSouth to negotiate the terms and conditions regarding § 271 elements." *Final Order Resolving Disputed Issues*, Alabama Public Service Commission Docket No. 29543 (April 20, 2006)
Arkansas	10/31/2005	"[T]his Opinion will not attempt to resolve Section 271 issues because they are not subject to arbitration under Section 252 of the Act." The Commission recognized that "ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 U.S.C. 251." It explained that "[t]his Commission's obligations under Section 271 of the Act are merely advisory to the FCC." *Memorandum Opinion and Order,* October 31, 2005, *In re: Petition of Southwestern Bell Telephone L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for Successor Interconnection Agreement to the Arkansas 271 Agreement,* Docket No. 05-081-U.
District of Columbia	12/15/2005	"[T]here is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252." The Commission made clear that its authority does not extend to requiring "inclusion of section 271 network elements in interconnection agreements." Order, December 15, 2005, *Petition of Verizon Washington, D.C. , Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,*

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		TAC 19, Order No. 13836, 2005 D.C. PUC LEXIS 257.
Florida	03/02/2006	"We find that we do not have authority to require BellSouth to include in § 252 interconnection agreements § 271 elements. We find that the inclusion of § 271 elements in a §252 agreement would be contrary to both the plain language of §§ 251 and 252 and the regulatory regime set forth by the FCC in the TRO and the TRRO." Florida Public Service Commission Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc.*
Idaho	07/18/2005	"[T]he Commission does not have the authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement." Order No. 29825; *2005 Ida. PUC LEXIS* 139.
Illinois	11/02/2005	"The Commission rejects CLECs' proposal to update underlying agreements requiring SBC to provide new rates, terms, and conditions for Section 271 elements, apart from any terms agreed to in the underlying agreement." Illinois Commerce Commission Docket No. 05-0442, *Arbitration Decision*, November 2, 2005,
Indiana	01/11/2006	Joined "the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271." Order, January 11, 2006, *In Re: Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communications Commissions' Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order,* Cause No. 42857.
Iowa	05/24/2005	Concluded it lacked "jurisdiction or authority to require that Qwest include [Section 271] elements in an interconnection agreement arbitration brought pursuant to § 252." *In re: Petition for Arbitration of Covad with Qwest,* Iowa Utilities Board, Docket No. ARB-05-1 (May 24, 2005), *2005 Iowa PUC LEXIS 186.*
Kansas	07/18/2005	"The FCC has preemptive jurisdiction over 271 matters." *Order No. 15: Commission Order on Phase II UNE Issues*, Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 (July 18, 2005).
Kentucky – U. S. District Court	04/22/2005	"While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the

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		proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first." *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order,* (E.D. Ky. Apr. 22, 2005). *But see BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order,* (E.D. Ky. Mar. 20, 2006) (statement about 271 in April 2005 order was *dictum* and was only addressed because the defendants argued that § 271 prevented the Court's entry of a preliminary injunction; the Court makes no finding as to § 271 requirements).
Louisiana	03/07/2006	The Louisiana Commission "declines to order BellSouth to include 271 elements in Section 252 agreements and further declines to set rates for Section 271 elements." *Order Nos. U-28131 Consolidated With U-28356,* Docket Numbers U-28141 and U-28356.
Maryland	04/08/2005	"With respect to whether Section 271 provides an independent basis for continued provisioning of switching . . . at TELRIC rates, the Commission notes that Verizon's fulfillment of its Section 271 obligations do not necessitate the provision of Section 251 elements at Section 251 rates." *In re: Petition of AT&T Comm. of Maryland, Inc. and TCG Maryland for an Order Preserving Local Exchange Market Stability,* Order No. 79893, Case No. 9026, 2005 Md. PSC LEXIS 11 (Apr. 8, 2005).
Massachusetts	07/14/2005	"[O]ur authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements." *In re: Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (July 14, 2005).
Minnesota	03/14/2005	"There is no legal authority in the Act, the *TRO,* or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest's objection . . . both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271." *Order Resolving Arbitration Issues*, Docket No. P-5692, 421/IC-04-549 (March 14, 2005) *(adopting December 16, 2004 Arbitrator's Report).*

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Mississippi - U. S. District Court	04/13/2005	"Even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC. . . ." *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005) *2005 U.S. Dist. LEXIS 8498.*
Montana – U.S. District Court	06/09/2006	Section 252 did not authorize a state commission to approve an agreement containing elements or services that are not mandated by Section 251. *Qwest Corp. v. Schneider, et al.*, 2005 U.S. Dist. LEXIS 17110, CV-04-053-H-CSO, at 14 (D. Mont. June 9, 2005).
Montana	01/08/2006	"The Commission does not have the jurisdiction or authority to arbitrate a Section 271 dispute under Section 47 U.S.C. 252." *In re: Petition for Arbitration of Covad with Qwest,* Montana Public Service Commission Docket No. D2005.4.51; Order No. 6647a (Jan. 8, 2006), *2006 Mont. PUC LEXIS 11.*
New Jersey	03/27/2006	"The Board declines to require separate unbundling under Sections 251, 252 and 271 of the Act, see *Implementation of the FCC's Triennial Review Order,* Docket No. TO03090705 (April 2, 2005, and disagrees with the need to institute any additional rate review proceedings at this time."
North Carolina	03/01/2006	"The Commission after careful consideration concludes that the Commission lacks the authority to compel BellSouth to include Section 271 UNEs in its Section 251/252 ICAs, nor does the Commission believe it has the authority to establish rates for such elements. . . ." *Order Concerning Changes of Law,* Docket No. P-55, Sub 1549 (N.C.U.C. Mar. 1, 2006).
North Dakota	02/08/2006	"We find that we do not have the authority under the Act to impose unbundling obligations under Section 271. The FCC has the exclusive authority to determine whether Qwest has complied with the substantive provisions of Section 271 including the checklist provisions. Enforcement of Section 271 requirements is also clearly under the exclusive jurisdiction of the FCC. State commissions have only a consulting role under the Act." *In re: Petition for Arbitration of Covad with Qwest,* North Dakota Public Service Commission Case No. PU-05-165 (Feb. 8, 2006), *2006 N.D. PUC LEXIS 3.*
Ohio	11/09/2005	"Although SBC's obligations under Section 271 are not necessarily relieved based on the FCC's § 251 unbundling analysis, these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements." Arbitration Order, Case No. 05-

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		0887-TP-UNC.
Oregon	09/06/2005	"Every state within the Qwest operating region that has examined [the Section 271] issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and [the Oregon Commission] adopt[s] the legal conclusions that they all hold in common ...." *In re: Petition for Arbitration of Covad with Qwest,* Oregon Public Utility Commission, Order No. 05-980, ARB 584 (Sept. 6, 2005), *2005 Ore. PUC LEXIS 445.*
Pennsylvania	06/10/2005	"[T]he enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations . . . ." *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc., et al;* R-00049524; R-00049525; R-00050319; R-00050319C0001; Docket No. P-00042092, 2005 Pa. PUC LEXIS 9 (June 10, 2005).
Rhode Island	07/28/2005	"At this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'" Docket No. 3662, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18* (July 28, 2005). *See also In re: Petition of Verizon-Rhode Island for Arbitration of an Amendment,* Rhode Island Public Service Commission Docket No. 3588 (Feb. 1, 2006), *2006 R.I. PUC LEXIS 8.*
South Carolina	03/10/2006	"The Commission . . .notes that several State commissions have concluded, in some form or fashion, that the FCC, rather than State commissions, is charged with Section 271 oversight . . . . [W]e have concluded that jurisdiction over Section 271 disputes lies with the FCC . . . ." *Order Addressing Changes of Law,* No. 2006-136, Docket No. 2004-316-C.
South Dakota	07/26/2005	The Commission "does not have the authority to enforce Section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests for interconnection, services, or network elements pursuant to section 251 . . . . In addition, . . . section 252(c)(1) requires the Commission to ensure that [its] resolution of open

EXHIBIT A

		issues 'meet the requirements of section 251 of this title, including the regulations prescribed by the FCC pursuant to section 251 of this title . . . .' The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements." *In re: Petition for Arbitration of Covad with Qwest,* South Dakota Public Service Commission Docket No. TC05-056 (July 26, 2005), *2005 S.D. PUC LEXIS 137.*
Texas	06/17/2005	"decline[d] to include terms and conditions for provisioning of UNEs under FTA § 271 in this ICA. The Commission finds that the FTA provides no specific authorization for the Commission to arbitrate Section 271 issues; Section 271 only gives states a consulting role in the 271 application/approval process." Arbitration Order, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Texas P.U.C. Docket No. 28821* (June 17, 2005).
Utah	02/08/2005	"Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law." *In re: Petition for Arbitration of Covad with Qwest,* Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005), *2005 Utah PUC LEXIS 16.*
Vermont	02/27/2006	The Vermont Board rejected the recommendation of the hearing officer that would have required Verizon to continue offering delisted UNEs under Section 271 or state law. Specifically, the Vermont Board required that "the amended interconnection agreements reflect the reduction in the unbundling obligations set out in the TRRO." The Vermont Board also made clear that "enforcement of Section 271 obligations rests with the FCC, not the state." Order, Docket No. 6932.
Washington	02/09/2005	Holding that, because "[t]he FCC has the exclusive authority to act under Section 271," state commissions "ha[ve] no authority under Section 252 or Section 271 of the Act to require inclusion of Section 271 unbundling obligations in the parties' interconnection agreements," and "[a]n order requiring [such] inclusion . . . would conflict with the federal regulatory scheme." *Washington Covad/Qwest Decision*, 2005 Wash. UTC LEXIS *38